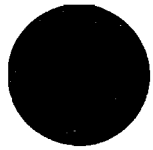
Bill 10-00



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Montgomery County Lodge 35, Inc.

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June 2, 2000

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RECEIVED COUNCIL

Honorable Derick Berlage
Montgomery County Council
100 Maryland Avenue
Rockville, Maryland 20850

Bill 10-00 *Collective Bargaining - Police Sergeants*

Dear Mr. Berlage:

Again, on behalf of Lodge 35 and its members, including police sergeants, I want to thank you and the co-sponsors of Bill 10-00 for supporting the sergeants collective bargaining bill, legislation which you appropriately indicated is long overdue.

As stated in prior correspondence and statements before the MFP Committee, police sergeant collective bargaining is very common in Maryland and throughout the country. Similarly, the inclusion of police sergeants and even lieutenants within the same bargaining unit, or under the same collective bargaining agreement, is an established practice.

Unfortunately, the major issues are being distorted by the irrational objection of the administration to so-called "effects bargaining." This distraction must, we feel, be addressed head-on to avoid future controversy, litigation, and misperception. Moreover, "effects bargaining" has been used as a red herring by our opponents.

The stated purpose of the Police Labor Relations Act ["PLRA"] is "to promote a harmonious, peaceful and cooperative relationship between the county government and its police employees and to protect the public by assuring, at all times, the responsive, orderly and efficient operation of the police department." The law further recognizes that "[s]ince unresolved disputes in the police service are injurious to the public and to police employees as well, adequate means should be provided for preventing such unresolved disputes and for resolving them when they occur." PLRA § 33-75.

We have honored this public policy and, indeed, since April 1982 when the current law was enacted, there have been no job actions by police officers; no picketing; no slowdowns; and no other actions that impaired our ability to serve the public. This is a significant tribute to a thoughtfully crafted law that was the result of hard work by the County Council, the Gilchrist Administration, and Lodge 35.

18512 Office Park Drive Montgomery Village, MD 20886

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Our law was the first collective bargaining law enacted in Montgomery County. It includes specific reference to "effects bargaining." On the other hand, the County Employees and Firefighter laws do not make such specific reference, but those laws do indeed require "effects bargaining."

It is because the older Police law makes specific statutory reference to "effects" that there is been very little litigation or dispute over the issue. In contrast, the newer County Employees law has been clarified through dispute and litigation. Indeed, MCGEO has had to file more Unfair Labor Practices Charges since their law was enacted in 1986 than has the FOP under the PLRA enacted in 1982.

It is in the spirit of resolving this issue here and now, rather than later, that we present the following for Council review and consideration.

EFFECTS BARGAINING

One of the bedrock concepts in American labor relations jurisprudence is "effects bargaining." Effects bargaining is basic to the practice of collective bargaining in practically every jurisdiction. It is a necessary component of the exercise of "management rights" both in the public and private sectors.

The National Labor Relations Board [NLRB] in its landmark decision *Ozark Trailers, Inc.*, 161 NLRB 561, 63 LRRM 1264, 1266 (1966) cited to earlier precedent in defining this concept, and explained that even when an employer is undertaking a managerial decision, such as the decision to completely shut down operations - perhaps the most fundamental management right of all:

> an employer is still under the obligation to notify the union of its intentions so that the union may be given an opportunity to bargain over the rights of the employees whose employment status will be altered by the managerial decision.

This duty cannot be neatly limited to a specified list of subject areas or scenarios. As Hill and Sinicropi explain in their often-cited text *Management Rights*, (BNA Books, 1989) at p. 412:

> The courts have not limited the scope of effects bargaining to a specific list of subjects. All aspects related to that decision may be encompassed in the broad scope of effects bargaining.

Indeed, as the NLRB has often recognized:

> The effects are so inextricably interwoven with the decision itself that bargaining limited to effects will not be meaningful if it must be carried on within a framework of a [management] decision which cannot be revised. An interpretation of the law which carries the obligations to 'effects,' therefore, cannot well stop short of the decision itself which directly affects 'terms and conditions of employment.'

Ozark Trailers, *supra*, at p. 1269. This iron link between the exercise of any management right and the duty to bargain how that exercise is to be effectuated is not set out in the text of the Federal Labor Management Relations Act, 29 U.S.C. §151 *et seq.* (LMRA). The LMRA merely requires that private sector employers "meet at reasonable times and c&a2661H"management rights" and "effects bargaining"

arise inexorably from the process of defining the frontier between what constitutes "wages, hours, and other terms and conditions of employment," and what subjects lie outside the duty to bargain.

The propriety of the concept of "effects bargaining" was approved by the U. S. Supreme Court in *First National Maintenance Corp. v. NLRB*, 452 U.S. 666 (1981). There, the Court said:

> [B]argaining over the effects of a [managerial] decision must be conducted in a meaningful manner and at a meaningful time....[The union] has some control over the effects of the decision and indirectly may ensure that the decision itself is deliberately considered.

452 U.S. at 682.

The twin concepts of "management rights" and "effects bargaining" have continued to be applied in public sector collective bargaining throughout the United States. Pursuant to the Civil Service Reform Act of 1978, employees of the Federal Government were granted collective bargaining rights. While the parameters of those rights are somewhat different than for the private sector (e.g. Federal employees are not permitted to strike), the basic concepts remain the same. As the U.S. Court of Appeals for the District of Columbia observed in *Dept. of Defense v. FLRA*, 659 F.2d 1140 (D.C. Cir. 1981), *cert. denied*, 455 U.S. 945 (1982):

> Even with regard to reserved management rights, the Act authorizes collective bargaining over the 'procedures which management officials of the agency will observe in exercising [their] authority....'

Thus, "effects bargaining" is also described as the duty to bargain over the procedures for implementing a managerial decision.

The same concepts have also been applied in Montgomery County collective bargaining laws, whether or not the County statute specifically includes a detailed guide to effects bargaining. The County Collective Bargaining Law, § 33-101, *et seq.*, Mont. Co. Code, 1994, and the Fire and Rescue Collective Bargaining Law, § 33-147, *et seq.*, Mont. Co. Code, 1994, do not include the general reference to effects bargaining found in the County's Police Labor Relations Act at § 33-80(a)(6). Nevertheless, "effects" or "procedural implementation" bargaining have been determined to be a necessary concomitant to the subjects of bargaining outlined in the County Collective Bargaining Law at § 33-107(a).

In *Montgomery County Government v. MCGEO-UFCW Local 400*, Case 90-1, the Montgomery County Labor Relations Administrator (LRA) determined that four bargaining proposals by MCGEO regarding contractual procedural regulation (by the use of seniority) of the County's implementation of the management rights to transfer, promote, fill vacancies, and assign overtime are "legal" proposals under County law. In reaching that decision, the LRA reviewed major precedents in state and local public sector bargaining affirming the concepts of effects bargaining. In that case, even the County conceded some of the basic premises of effects bargaining. The LRA noted:

> In any event, the County's position throughout has been that it is legal and appropriate to entertain and discuss 'seniority' proposals, and to agree to same, when it is 'post-decisional' i.e. after the County decides that services and operating efficiencies are not substantially impaired....
>
> The four proposals as written do not violate the County's prerogatives. The County concedes that the proposals fall within the general definition of 'conditions of employment' under [the statute] ... and since seniority matters are of fundamental concern to employees, the County violated the statute by failing to bargain.

This decision brings us full circle to the premise enunciated by the Supreme Court in *First National Maintenance, supra*: "[The union] has some control over the [managerial] decision...."

As we have referenced, the Police Labor Relations Law includes at Section 33-80(a)(7) the duty to bargain:

> The effect on employees of the employer's exercise of rights enumerated in subsection (b) hereof.
>
> Section 80(b) lists management rights under the PLRA.

Whether or not such a provision were to be included in any collective bargaining legislation covering police supervisors or other County employees not presently covered by a collective bargaining unit, the concept of "effects bargaining" is so deeply ingrained in American labor relations jurisprudence, that any statute directing collective bargaining regarding any subjects traditionally included within the concept "wages, hours, and other terms and conditions of employment" necessarily includes effects bargaining.

During the 18 years of the parties' experience with the PLRA, there have been few if any formal controversies regarding the scope of proper subjects of bargaining. This excellent experience has been fostered by the detailed clarity of the bargaining duty under the PLRA. Removal of the specific reference to effects bargaining from any future law would simply raise the possibility that sergeants, through their union, will have to clarify that such bargaining is required through litigation, such as occurred shortly after the promulgation of the County Collective Bargaining Law in 1996.

LAW SHOULD BE CONSISTENT

A problem with exclusions of specific reference to "effects bargaining" is that two groups of police employees will be bargaining under different statutes. This is akin to a football game where one team plays under NFL rules and the other plays under Canadian Football League [CFL] rules. Clearly, confusion and disputes will result.

Moreover, established legislative terms and understandings will be disputed and a new law will need to be defined through dispute resolution mechanisms and litigation. This is not in the larger interest of the sound public policy articulated at § 33-75.

The PLRA represents a balance of the interests between Management and the Union. American labor law has evolved over scores of years as a result of the struggles of employees to achieve democracy in the workplace on the one hand, and management to hold onto what it perceives as its "prerogatives."

It is out of respect for the manner in which the PLRA was drafted in response to a Citizen Initiative that Lodge 35 has not sought to expand the scope or parameters of the PLRA beyond the inclusion of sergeants under the same law. (We were honest and open with the 1982 Council and Executive, as well as political candidates since that time, that we intended to continue to push for inclusion of sergeants.) Unfortunately, the Duncan Administration has exploited this legislation and the OLO study of the police complaint system to attack an established law.

"EFFECTS BARGAINING" IS WIDELY MISUNDERSTOOD

"Effects bargaining" has been blamed for all sorts of perceived evils unrelated to the concept. Interestingly, the department issues internal directives regularly. Very few of those directives involve bargaining. Those that do, generally address mandatory bargaining, not effects. For instance, directives and policies on arrest procedures, enforcement priorities, district boundaries, crime reporting, selective enforcement, issuance of citations, jurisdiction, department organization, search and seizure, prisoners and fugitives, community services, and public relations rarely result in bargaining of any kind. And when they do, bargaining is limited to small and specific portions that involve working conditions.

Part of the confusion has been the result of Contract Article 61 *Directives and Administrative Procedures*. That Article requires that "[n]egotiable matters pertaining to administrative procedures, department directives, and rules referenced in this agreement . . . are subject to addition, change, amendment, or modification, only after specific notice is provided to the union with an opportunity to bargain and after the parties reach agreement. If no agreement is reached, the addition, change, amendment, or modification shall not be implemented." The Article further provides that

"[c]hanges to directives, rules and procedures not enumerated in th[e] agreement, or the effects on employees of the employer's exercise of a management right as enumerated in Article 42 § A, which involve matters appropriate for collective bargaining will be proposed by the County to the Union for bargaining. Thereafter, and before implementation, bargaining and agreement shall occur. Failing agreement, the dispute will be resolved pursuant to the impasse procedures . . . of Chapter 33, § 33-81(b) of the Montgomery County Code."

This Contract Article simply affords the County flexibility to seek change without waiting for bargaining on a successor (or term) contract. An analogy to the County's budget process might be appropriate.

In March of each year the Executive submits a recommended budget to Council. Council spends considerable time analyzing and questioning the recommendation. By law, a date is set for approval of the budget that becomes effective on July 1.

Should the Executive desire to amend or supplement the budget after July 1, s/he must follow certain procedures and submit the request to Council. As you well know, certain requests are barred until after January 1. Charter § 307. Emergency appropriations to meet specific circumstances can be made at any time. Charter § 308. In both cases, public notice is required. These charter provisions apply to all county agencies, including public safety.

Council will deliberate and discuss these supplemental budget requests. Year after year, we read of the Executive's expressed frustration with Council for doing its job. Executives have accused Council of micro-managing, interfering, endangering public safety, etc. The rhetoric goes on year after year, budget after budget. Such is the nature of our democratic form of government.

Like the budget process, the term bargaining process takes place at certain times. Contracts last for not less than one, nor more than three years. In November, we commence the process. If no resolution is reached by January 20, impasse reached. All issues must be resolved by February 1 and portions of the Agreement requiring Council action must be submitted as part of the Executive's Recommended Budget. By May 1, the Council must indicate its intent to accept or reject all or any portion of the agreement. If any portion is rejected, the parties enter into a process for resolution. The contract becomes effective on July 1.

Therefore, for purposes of our analogy, term bargaining is like the annual budget process. Interim bargaining under Article 61 and "effects bargaining" is like supplemental budget requests.

Both the budget and bargaining processes require deliberation and review by the parties, neither interferes with the efficient and effective delivery of essential public services. Both are subject to complaints by the Executive!

In this regard, management is critical of Lodge 35 for its thorough analysis of issues submitted for bargaining, saying this is time-consuming. Like legislatures and good business in all segments of our society, all parties have a duty to be thorough. We do not take our obligations lightly.

Another recent management complaint has been the delay in bargaining "effects" and non-effects issues midterm in the contract. Both sides have been responsible for delay in various matters. If this is a concern of either management or the union, either is free to require the other to bargain through established procedures, e.g. Charge of Prohibited Labor Practice.

Penultimately, it must be restated that the Police Complaint Process study that brought this issue to the forefront of attention is mostly unrelated to any collective bargaining. The investigation of most complaints against police officers, and all complaints alleging excessive use of force, is governed by the Law Enforcement Officers' Bill of Rights. Article 27, § 727, *et seq.* of the Annotated Code of Maryland.

That law affords police officers certain procedural rights in investigations, including the right to ten (10) days to obtain representation before being subjected to questioning of the officer concerning his/her conduct. Hence, no matter how serious the allegation, the officer has ten days after notification to make a statement, but management frequently postpones asking for that statement, thereby delaying the process. But, as stated, this is state law, not collective bargaining.

Management complains of this law and says, that because of "effects bargaining" it can't engage in corrective action to prevent inappropriate conduct. Our response is simple: In the very few cases where this has been at issue, we demanded due process for our members and management tried to deny that due process notwithstanding the constitution and Personnel Regulations Section 3.2 *Due Process*. Management can submit a proposal to bargain, but hasn't. To say that "effects bargaining" is at the root of all evil is disingenuous at best. (Even management touts the low number of complaints relative to the amount of police activity.)

I further note that it has been those areas where the LEOBR or an unfettered management right applies that have been the subject of most criticism. The Department of Justice was falsely told by police management that FOP Lodge 35 delayed the disciplinary process and Lodge 35 provided proof that it did not. DoJ found many management, not FOP, deficiencies and the recently signed Agreement with DoJ preserved all contract and PLRA rights while requiring changes in certain management (not FOP) practices.

In sum, this issue has been exploited and misunderstood. Most collective bargaining involves mandatory subjects of bargaining, not "effects." "Effects bargaining" exists even when a statute does not create it, for there is no bright line test to determine if a matter is a mandatory subject of bargaining or an effect of the exercise of a management right.

Our law, unlike the other County bargaining laws, sets forth by statute what others have had to define through litigation. Our job as police officers is a tough one. The public is better served when we negotiate according to statute than when we litigate over it.

Our goal is to avoid continuing controversy, not to create it. We therefore urge Council to include sergeants in the bargaining unit under the law that has existed for 18 years.

We look forward to working with you, the MFP Committee, and full Council on this most important legislation.

Sincerely,

Walter E. Bader
President

Enclosures (Reference material; MCGEO ULP Case 90-1)

cc: Mr. Andrews, Lead, MFP
Mrs. Dacek
Mr. Denis
Mr. Ewing
Mr. Leggett
Mrs. Praisner, Chair, MFP Committee
Mr. Silverman
Mr. Subin, President

BEFORE THE MONTGOMERY COUNTY
MARYLAND
LABOR RELATIONS ADMINISTRATOR

In the Matter of a Charge of Prohibited Practices filed Against MONTGOMERY COUNTY GOVERNMENT -and- SIDNEY KRAMER, Montgomery County Executive Charged Parties and MONTGOMERY COUNTY GOVERNMENT EMPLOYEES ORGANIZATION A Division of UNITED FOOD AND COMMERCIAL WORKERS, LOCAL 400 Charging Party	Case No. 90-1

Joseph A. Sickles
Labor Relations Administrator

Appearances:

For the Charging Party:	William W. Thompson II Gino Renne
For the Charged Party :	Sharon Burrell Linda D. Berk

DECISION ON REMAND

BACKGROUND

On or about February 16, 1990, the Montgomery County Government Employees Organization, a division of United Food and Commercial Workers, Local 400 (herein "union") submitted to the Labor Relations Administrator (herein "LRA") a charge of prohibited practices, asserting that the Montgomery County Government and

Sidney Kramer, Montgomery County Executive (herein "County") refused to respond to four (4) union demands during the last collective bargaining negotiation sessions.

Subsequent to compliance with the requirements of the Montgomery County Collective Bargaining Law (Article VII, Section 33-101 et seq) the Collective Bargaining Regulations and Procedures (# 43-89, Effective January 11, 1990) and the Administrative Procedure Act, hearings were conducted on March 28 and 29, 1990 and a 151 page verbatim transcript of proceedings was compiled.

Both parties submitted Briefs on or about April 23, 1990, and after full consideration of all items of record, the LRA issued a Decision and Order on July 25, 1990 sustaining the charge.[1]

On August 21, 1990 the County filed an Order For Appeal and Petition on Appeal in the Circuit Court for Montgomery County, Maryland (herein "Court"). The County alleged that the 7/25/90 decision is arbitrary and capricious, violates the Montgomery County Charter and Montgomery County Code, is contrary to policy and standards for merit system employees, and is not supported by law or the evidence on the record. The County requested the Court to reverse the Decision and Order and to rule that the County is not required to bargain with the union over proposals which violate its rights as set forth in Montgomery County Code sec. 33-107(b).

On September 21, 1990, the union submitted an Answer and Motion to Dismiss the Appeal.

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[1] No purpose is served in repeating the contents of The July 25, 1990 Order and Decision at length in this document, but excerpts will be cited herein as "7/25/90 decision"

Subsequent to Court proceedings, a June 14, 1991 Order was issued by the Court remanding the matter to the LRA.

The LRA received the record from the Court on August 8, 1991.

COURT'S ORDER

The June 14, 1990 Order of the Court (Case No. 63381) stated that the issue before the LRA in the charge was "... whether or not the four seniority proposals presented by [the union] in the parties' negotiations for the contract for the years 1990-93 are bargainable." (Paragraph 1)

The Court noted that: "In order to be bargainable, the four seniority proposals, if agreed to, must be capable of being included in the parties' collective bargaining agreement." (Paragraph 2) and the Court held that: "The Labor Relations Administrator erred in not deciding the issue presented to him." (Paragraph 3)

The Court Ordered:

> 1. That the decision of the Labor Relations Administrator is vacated on the grounds that his decision that the Appellants had committed a prohibited practice was based on a finding that the general subjects in issue fall within the duty to bargain, instead of a finding as to whether the proposals as written could be agreed to without violating the collective bargaining law.
>
> 2. That the matter be remanded to the Labor Relations Administrator who is directed to use whatever means necessary to decide the following issue:

QUESTION AT ISSUE

The specific issue mandated by the Court is:

> Are the four seniority proposals, as presently written, legal or illegal under Montgomery County Code, sec. 33-107?

DISCUSSION

The Four seniority proposals presented by the Union on November 9, 1989 for the parties' negotiation of the 1990-1993 contract are:

> Article 5.9 OVERTIME: Overtime work shall be voluntary. There shall be no discrimination against any employee who declines to work overtime. When there are no volunteers in the event of an emergency, the employee with the least seniority shall be required to perform the overtime duty. Work schedules for members of the bargaining unit shall not be changed for the purpose of avoiding overtime.
>
> Article 9 WORKING CONDITIONS: 9.3 (a) Change last sentence to read: Employees covered under this agreement shall have first preference to fill such job openings in accordance with their seniority, within the highest rated category.
>
> Article 23 TRANSFER: 23.3 (b) Change to read: Transfers shall be done on the basis of seniority. senior employees desiring a transfer shall be offered the first available position for which they are qualified.
>
> Article 24 PROMOTION: 24.2 delete last sentence and replace with: Promotions shall be made in accordance with seniority with the most senior qualified candidate receiving the job.

In the 7/25/90 LRA decision, the Questions at Issue was framed in a broader sense than the question remanded by the Court[2] and the ultimate decision, which answered that question in the

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[2] "Are the four demands....matters subject to bargaining...? (Underscoring supplied)

affirmative, deliberately refused to make a narrow determination that the four proposals, as written could be included in the collective bargaining agreement[3] in an effort to follow the dictates of the County Statute that I provide for an "...effective implementation and administration of this article concerning ...prohibited practices..." (Article VII, Section 103 [a]) and issue a remedial order which would best "...remedy the violation..." (Article VII, Section 33,109 [d]) and at the same time not further polarize the parties into their position but rather permit continuance of free collective bargaining between the parties as is recognized and preferred in the statute. Nonetheless, the Court in its wisdom has remanded the matter to me to make a definitive determination of whether four seniority proposals, as presently written, are legal or illegal under the Montgomery County Code, Sec 33-107.

I find that the four proposals are capable of being included in the parties' collective bargaining agreement if agreed to and, as presently written, they are legal under Montgomery County Code, Sec 33-107.

Article VII, Sec 33- 107 (b) specifically limits the matters which are conditions of employment subject to bargaining under 107(a) and neither the statutory Article nor an agreement made

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[3] "While it may be, and the undersigned makes no determination in this regard, that the proposals, as now written could not be agreed to without violating Article 33, Section 107 (b), at the same time topics of overtime, filling of vacancies, transfers and promotions, as well as the topic of seniority itself cannot be so odious as to fall outside of the definition of 'working condition' and thus I find a duty to bargain." Page 23 7/25/90 decision

under it shall impair the right and responsibility of the employer to perform the following:

> (4) Determine the overall organizational structure, methods, processes, means, job classifications, and Personnel by which operations are to be conducted and the location of facilities.
>
> (5) Direct and Supervise employees.
>
> (6) Hire, select, and establish the standards governing promotion of employees, and classify positions.
>
> (9) Transfer, assign and schedule employees

One could suppose that a bland reading of the proposals and a cold comparison with the statutory language might lead a reader to question inclusion in the agreement. But that is not the true test.

In Beloit Education Assn. v. WERC, 73 Wis. 2d 5, 242 N.W. 2d 231 (1976) the Wisconsin Supreme Court considered a state statute requiring public employers to meet and confer regarding conditions of employment. There were restraints in that statute similar to those here under review and the school Board had resisted negotiating in certain areas because of "school management and educational policies". The Court held that matters fundamentally, basically or essentially a wage, hour or condition of employment are required to be bargained. Considering a question of layoff by seniority the lower court had discussed a clarification and modified the commission's holding to require a "reasonable clarification" to that effect be inserted in the collective bargaining agreement if proposed by the school board. The Court noted at 242 N.W. 2d 231, 239:

> As so clarified and modified, the proposals stop well short of invading the school board's right to determine the curriculum, and to retain, in case of layoff, teachers qualified to teach particular subjects in such curriculum. As so limited and modified, the proposal, we hold, is one primarily related to "wages, hours and conditions of employment" and hence required to be bargained.[4]

See also Minneapolis Federation of Teachers, Local 59 v. Minneapolis Special School District # 1 258 N.W. 2d 802 wherein a declaratory judgment was sought to compel bargaining on transfer procedures as a mandatory topic under a meet and confer statute. The trail court had found that teacher transfers were a matter of inherent managerial policy (excluded by law from being a mandatory subject of bargaining) but the Supreme Court reversed. It noted at 258 N.W. 2d, p. 805:

> There is no doubt the decision to transfer a number of teachers is a managerial decision. The criteria for determining which teachers are to be transferred, however, involves a decision which directly affects a teacher's welfare and enters into a field which we hold is in fact negotiable.

The New Jersey Supreme Court held that there is no danger of a merit system being injured when only qualified employees are included in the proposal concerning layoffs, recalls, bumping etc. by seniority dictate. State of New Jersey v. Supervisory Employees' Assn. Local 195 IFPTE and Local 518, SEIU, 393 A 2d 233[5]

The record is singularly clear in this case that the Union

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[4] See also cases cited in footnotes 9,10,11 and 12 of the Court's decision.

[5] The Court did not compel bargaining based upon another statute dealing with a statutory seniority crediting system, which is not pertinent here.

clarified, at the bargaining session, that its proposals only referred to qualified individuals, and in fact the last three proposals specifically relate to qualification and it is implicit in the first proposal even if clarification had not been made. The entire bargaining history of these two parties can not permit of any conclusion other than a clear understanding by the County that the Union was always willing to accept the County's qualification determinations.

Union negotiator, Renne, testified as to the County's counter-proposals during the 1986 negotiations and the fact that the Union conceded that the County made qualification determinations. (See TR 67, et seq: 3/29/90). In 1990-1991, the County made no counter-proposals to the four proposals, but at one point the County asked who made qualification determinations. The Union "...again emphatically responded that obviously, you're the employer, you would determine qualifications." (TR 73, 3/29/90) See also the discussion at TR 89, 3/29/90:

> Q. Now, regarding the determination of who are qualified for a transfer or promotion, how is that determination made?
>
> *** *** *** ***
>
> Mr. Sickles: Isn't it conceded that the Management does?
>
> Mr. Thompson: Yeah, we've been trying to trumpet that through this whole proceeding.
>
> Ms. Burrell: I have no further questions.

The County's EEO officer reviews potential vacancies and promotions and may designate a position for "affirmative action consideration." Neither overtime nor transfers are covered by the

EEO considerations (TR 70, 3/28) and the County concedes that the Union stated at negotiation sessions, and continues to insist, that its proposals were in no manner to be construed as disturbing any EEO goals. See TR 66, 3/28/90: TR 73, 3/29/90.

It is interesting to note that the County did respond to allegedly non-negotiable proposals during the 1986-87 bargaining. See Page 19 of the County's April 23, 1990 Brief to the LRA:

> The Union was not aware when it offered its initial proposals that the County would assert that proposals which include seniority as a standard for personnel actions are non-negotiable. Therefore, in good faith, the County offered negotiable counterproposals so that the parties could enter into an agreement which provided for all matters subject to bargaining. (See testimony of James Torgeson, Transcript, Vol. II, p. 88)

See also TR 104-105, 3/28/90

But in the 1990-1993 negotiations, the County asserted non-negotiability under 107 (b), alleging impairment of management rights and responsibilities under the statute, and it apparently waited for the Union to modify its proposals or offer counterproposals. See Page 2, County's April 23, 1990 Brief to the LRA and TR 31, 3/28/90 [6]

In any event, the County's position throughout has been that it is legal and appropriate to entertain and discuss "seniority" proposals, and to agree to same, when it is "post decisional" i.e.

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[6] The County also objected to a fifth 1989 proposal which had overtones of seniority as it related to leave and vacation scheduling. During the mediation stage, the County responded to the Mediator's request for counterproposal language and finally the parties agreed to section 14.7 of Exhibit Q. After the County determines service and operating efficiency matters, vacation preferences are honored on a seniority basis.

after the County decides that services and operating efficiencies are not substantially impaired. The County insists that it must make the initial and basic decision of need, and then, if it merely becomes a question of which employee "gets off (in a leave situation, for example) that question may properly be decided solely on a seniority basis.(See TR 35, 3/28)

I find that the four Union proposals at issue, as written, and surely as clarified and/or explained at the bargaining table, and (as noted previously) fully understood by the County during the negotiating sessions are no less "post decisional" than other proposals and agreement provisions not found to be odious, illegal or statutorily restrictive by the County.

The County feels that the selection of the least senior person to work overtime might result in the designation of a person it did not want (TR 26, 3/28/90) and it could result in promotions and/or transfers of persons when a particular supervisor desired someone else. But, as long as the employee summoned for overtime work is qualified to do the job (a management decision) and/or the person promoted, transferred or assigned to a vacancy is qualified to perform the task, as decided solely by management, a seniority preference system is as 'post decisional" as the identity of the person who is on leave or vacation at a given time, or the identity of the employee who drives a particular Ride-On bus route.

Surely the designation which is made only after the County finds a need for overtime and/or finds it appropriate to transfer, promote or fill a vacancy (post decisional) and is made only from

those the County has deemed to be qualified (and/or fall within the highest rated category designated by the County) does not run afoul of Section 107 (b). A reasonable reading of section 107 (b) does not suggest that it would impair any of the enumerated rights and responsibilities. In short, the employer still decides the structure, methods, means, job classifications, etc. and chooses its basic personnel at its designated facilities. It has not abandoned direction or supervision of employees nor is hiring compromised. It still selects and establishes the standards governing promotions, still classifies positions and still makes the initial unilateral determination that qualified employees are to be transferred, assigned, etc.

The four proposals as written do not violate the County's prerogatives. The County concedes that the proposals fall within the general definition of "conditions of employment" under 107 (a) and since seniority matters are of direct fundamental concern to employees, the County violated the statute by failing to bargain.

DECISION

The four seniority proposals, as presently written, are legal under Montgomery County Code, sec 33-107.

Joseph A. Sickles
Labor Relations Administrator
Montgomery County, Maryland

August 27, 1991

IN THE CIRCUIT COURT FOR MONTGOMERY COUNTY, MARYLAND

MONTGOMERY COUNTY, MARYLAND and NEAL POTTER, Plaintiff	:	
v.	:	Civil No. 81020
MONTGOMERY COUNTY GOVERNMENT EMPLOYEES ORGANIZATION AKAS: UFCW LOCAL 400 AFL-CIO, Defendant	:	

Rockville, Maryland

July 2, 1992

WHEREUPON, proceedings in the above-entitled matter commenced,

BEFORE: THE HONORABLE J. JAMES McKENNA, Judge

APPEARANCES

FOR THE PLAINTIFF:

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P R O C E E D I N G S

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PARTIAL TRANSCRIPT

THE COURT: I want to thank the lawyers for a well argued and a well briefed issue. It is nice, it is kind of a pleasure. I don't know about you, but I was enjoying this this morning. I don't always enjoy myself up here, so I appreciate it, with both of you.

Now, I think that the first thing that I have to kind of touch upon is the question of whether or not this is purely a legal issue; thus, if that be the case, that I can chuck out any notions of being deferential to the LRA.

I think that the better of the two arguments on it is that it is a mixed question of law and fact. I am loathed to say that it was a total exercise in futility to have gone through the two days of hearings and taking of testimony that occurred before the LRA and just simply dismiss that with a wave of the hand. I think that it was absolutely necessary in order to come to some kind of a conclusion with regard to it.

I do accept the distinction that is made by the union in this case as to, first, the -- well, the phraseology that I might use is maybe a little bit different, but essentially that when the superstructure of the event that is to occur, whatever it is, is provided for

by the County, once that is accomplished, that the then carrying out of that becomes an item that is negotiable and should come within the bargaining between the parties, and I am satisfied, having read the briefs and hearing argument, that the superstructure is in place and has been placed in place by the County, the County has all of the -- or a great number of the cards which it can play before it ever gets to a situation where any one of these proposals by the union would trigger in, and that really what has occurred here, what the union is seeking to do, is to have a discussion in the bargaining process, pursuant to 33-107, both a and b.

This is by way of saying and underscoring what the LRA did. I will accept that this particular fellow is a nationally recognized man. I have no reason to think otherwise, and if counsel says so, I will accept that, as he being an officer of the court, and I feel that under these circumstances, since it is a mixed question of law and fact, I must -- this court must give great deference, or at least some deference to his findings of fact with regard to all these matters; therefore -- and the only issue that he was asked to address, this last go-round, was the question of legality or nonlegality of the proposals. He found that they were legal. In this context, the question of legality or nonlegality, as lawyers at least know and I have come to know, is a word of art and that implicit in what the LRA did

was to find that these issues were legal and that they, therefore, are a fortiori bargainable and come within the terms of items under 33-107. Therefore, I will affirm the findings of the LRA and that will be the end of it.

I do want to thank you again for well written and well argued briefs. Thank you very much.

(Whereupon, the court's ruling in this matter was concluded.)